

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

RAYMOND G. CARYL,  
Appellant,

v.

DEPARTMENT OF THE TREASURY,  
Agency.

DOCKET NUMBER  
DE07529010187

DATE: MAR - 2 1992

Joseph L. Esposito, Esquire, Smitherman & Esposito,  
Tucson, Arizona, for the appellant.

David L. Lindsey, Esquire, El Paso, Texas, for the  
agency.

BEFORE

Daniel R. Levinson, Chairman  
Antonio C. Amador, Vice Chairman  
Jessica L. Parks, Member

OPINION AND ORDER

The agency has petitioned for review of an initial decision in which the administrative judge ordered it to mitigate the appellant's removal to a one-grade demotion. The appellant has filed a motion for enforcement of the administrative judge's interim relief order or, in the alternative, for dismissal of the agency's petition for review. For the reasons discussed in this Opinion and Order, we DENY the appellant's motion and the agency's petition for review.

### BACKGROUND

The appellant, a GS-13 Customs Pilot, petitioned for appeal of the agency action removing him based on two charges, careless or reckless operation of an aircraft and violation of Federal Aviation Administration regulations regarding clearance for landing. See Initial Appeal File (IAF), Tab 1. After affording the appellant a hearing, the administrative judge sustained the charges but mitigated the penalty. The administrative judge ordered the agency to cancel the removal action and substitute in its place a demotion from his GS-13 Customs Pilot position to a GS-12 Customs Co-Pilot position. Because the appellant was the prevailing party, the administrative judge ordered the agency to provide him, if a petition for review were filed, with interim relief in accordance with 5 U.S.C. § 7701(b)(2)(A). The administrative judge further stated that the relief should be effective on the issuance of the decision and should remain in effect pending the outcome of any petition for review. See IAF, Tab 21 (Initial Decision at 11-12).

The agency filed a petition for review of the initial decision on June 22, 1990. See Petition for Review File (PRF), Tab 1. On July 23, 1990, the appellant filed a motion seeking compliance with the interim relief order. In that motion, he alleges that the agency has not complied with the interim relief order because it has limited his duties to working in a radio room for 40 hours a week, because he is not part of an air group team, as are the other pilots, and

because the agency has not afforded him the opportunity to fly or to secure "recurrency training" (apparently continuing routine training requisite to maintaining flying status). He therefore asks that the agency's petition for review be dismissed under 5 C.F.R. § 1201.115(b)(4). In the alternative, he argues that the agency should be required to comply with the administrative judge's interim relief order. See PRF, Tab 5.

In response, the agency argues that it has fully complied with the initial decision by timely returning the appellant to his place of employment with compensation and all other benefits. The agency also argues that: (1) The appellant was grounded and detailed to the radio room at the time the removal action was proposed; (2) it has compelling reasons for withholding his recurrency training because the training would be economically wasteful in the event the removal is sustained and would further disrupt the unit's operations; and (3) because the appellant remains in a non-flight status, he will not be performing any law enforcement activities, and so the agency has withheld his badge and credentials. See PFR File, Tab 7.

#### ANALYSIS

The Board's regulations do not provide for a petition for enforcement of an order for interim relief, and we will not entertain such petitions, as we held in *Ginocchi v. Department of the Treasury*, MSPB Docket No. DC315I8910527, slip op. at 9 n.4 (Feb. 19, 1992). We will, however, consider the appellant's

motion to seek compliance with the administrative judge's interim relief order as a motion to dismiss the agency's petition for review. See *id.*<sup>1</sup>

As we also held in *Ginocchi*, the Board will not look behind an agency's determination that returning an appellant to the workplace would be unduly disruptive, *id.* at 8, and its review of the propriety of an agency's decision to detail, assign, or restrict the duties of an employee for whom interim relief is limited to a determination of whether the agency's decision was made in bad faith, *id.* at 13.<sup>2</sup> As we further held in *Ginocchi*, the agency's interim relief action will be deemed in bad faith, and its petition for review will be dismissed, if the appellant proves, for example, that the relief afforded is discriminatory, demeaning, or inherently unsafe. *Id.*

In applying that standard here, we note that the appellant alleges that he is being made to "sit on his hands," and he complains of the effect his inability to fly or to secure recurrency training could have on his ability to fly if the initial decision is upheld. These assertions do not show,

<sup>1</sup> We therefore will not consider the agency's additional argument that the appellant's August 3, 1990, motion to seek compliance with the interim relief order failed to meet the time limits set for the filing of petitions for enforcement. See PFR File, Tab 7.

<sup>2</sup> While the Board indicated further in *Ginocchi* that an appellant could seek the remedy of dismissal of the agency petition if the agency failed to show that the appellant was receiving the benefits to which he was entitled, see *Ginocchi*, slip op. at 8, the appellant in the present appeal does not allege that he has not received those benefits.

however, that the agency's action is discriminatory, demeaning, or inherently unsafe, or that it otherwise evidences bad faith on the part of the agency. See *id.*

We note further that the agency has submitted, with its petition for review, copies of an official notification of personnel action form and a letter to the appellant directing him to return to duty as a GS-12 Airplane Co-Pilot. See PRF, Tabs 1, 7. We find this evidence to be timely filed and otherwise sufficient to establish compliance with the administrative judge's interim relief order. See 5 C.F.R. § 1201.115(b).

In light of our denial of the appellant's motion, we have considered the agency's petition for review of the initial decision. We find, however, that the petition does not establish error in the administrative judge's consideration of the evidence, in his findings regarding the seriousness of the appellant's actions, or in his conclusion regarding the reasonableness of the penalty the agency imposed. We therefore conclude that the petition fails to meet the criteria for review. See 5 C.F.R. § 1201.115.

#### ORDER

We ORDER the agency to cancel the appellant's removal and to effect in its place a demotion to GS-12 Airplane Co-Pilot, effective January 27, 1990. See *Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish this action within 20 days of the date of this decision.

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance.

This is the Board's final order in this appeal. The initial decision in this appeal is now final. See 5 C.F.R. § 1201.113(b).

NOTICE TO APPELLANT


You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Washington, D.C.

  
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Robert E. Taylor  
Clerk of the Board